

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KEVIN J. KOT	:	DETERMINATION
	:	DTA NO. 820654
for Redetermination of Deficiencies or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1994 and 1995.	:	

Petitioner, Kevin J. Kot, 23 Maxwell Road, Latham, New York 12110, filed a petition for redetermination of a deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1994 and 1995.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed December 7, 2005, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5; 3000.9(a)(i) and (b) on the ground that there exists no material and triable issue of fact. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with the exhibits attached thereto in support of the motion. Petitioner had 30 days, or until January 7, 2006, to respond to the motion but did not do so, and the 90-day period for issuance of this determination commenced on January 7, 2006. After due consideration of the documents and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Kevin J. Kot, two notices of deficiency, dated December 2, 1996, which were addressed to him at “23 MAXWELL RD, LATHAM, NY 12110-5300.” The first notice bore assessment identification number L-012955300 and asserted a withholding tax penalty of \$47,049.96 for the period ended October 31, 1994 through December 31, 1994. The second notice was mailed to the same address and bore assessment identification number L-012955301. It asserted a withholding tax penalty of \$6,817.02 for the tax period January 1, 1995 through June 30, 1995.

2. On April 7, 2005, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the notices of deficiency dated December 2, 1996. The request was received by BCMS on April 8, 2005.

3. On April 22, 2005, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on December 2, 1996, but the request was not mailed until April 7, 2005, or in excess of 90 days, the request is late filed.

4. Notices of deficiency, such as the ones at issue herein, were computer-generated by the Division’s computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of deficiency were being mailed

and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of deficiency was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date (the date of its printing) in its upper left corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of November 21, 1996 which was manually changed to December 2, 1996.

6. After a notice of deficiency was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer placed the notice and associated documents into an envelope, weighed and sealed the envelope and affixed the postage and fee amounts thereon. A Mail Processing Center clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the sealed, stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

7. In the ordinary course of business a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control Unit.

8. In the instant case, the CMR was a 38-page, fan-folded (connected) computer-generated document entitled "Certified Record for ZIP + 4 Minimum Discount Mail." This CMR listed 415 control numbers. Each such certified control number was assigned to an item of mail listed on the 38 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the notices of deficiency issued to petitioner was contained on page 23 of the CMR. Corresponding to certified control numbers P 911 004 299 and P 911 004 300 were notice numbers L 012955300 and L 012955301, respectively, along with petitioner's name and an address, which was identical to that listed on the subject notices of deficiency.

10. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated December 2, 1996.

11. The last page of the CMR, page 38, contained a printed entry of "415" corresponding to the heading "Total Pieces and Amounts." The printed entry of "415" was circled and the name or initials of the postal employee was written below the printed entry. The name or initials of the postal employee also appear on the first and second pages of the CMR.

12. The affixation of the Postal Service postmarks, the name or initials of the Postal Service employee, and the circling of the "415" indicated that all 415 pieces listed on the CMR were received at the post office.

13. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

14. The facts set forth above in Findings of Fact “4” through “13” were established through the affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency. Mr. Peltier was employed as a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The address on the subject notices of deficiency was the same as the address given on petitioner’s New York State personal income tax return for the year 1995, the most recent return filed when the notices of deficiency were issued. In addition, the same address was used by petitioner on his request for conciliation conference, dated April 6, 2005, and on his petition herein, dated July 21, 2005.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division’s motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182

AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where it has been determined that there is a deficiency of income tax. This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.” In this case, the record is clear that the address listed on the subject notices of deficiency was petitioner’s last known address.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with BCMS, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the mailing of the notice (*Matter of Novar TV & Air Conditioner Sales and Service, Inc.*, Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991 [citations omitted]). However, the “presumption of delivery” does not arise unless or until sufficient evidence of

mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of deficiency in issue were mailed to petitioner on December 2, 1996. Specifically, this 38-page document listed certified control numbers with corresponding names and addresses, including petitioner's control numbers, notice numbers and name and address. All 38 pages of the CMR bore a U.S. Postal Service postmark dated December 2, 1996. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee signed or initialed page 38 of the CMR and circled "415" on that page to indicate receipt by the post office of all 415 pieces of mail listed thereon. This evidence is sufficient to establish that the Division mailed the subject notices of deficiency on December 2, 1996.

H. Petitioner's request for a conciliation conference was mailed on April 7, 2005, well in excess of 90 days after the issuance of the notices of deficiency on December 2, 1996. Therefore, the request was untimely filed (*see*, Tax Law § 681[b]; § 689[b]; § 170[3-a][a]).

I. The Division's Motion for Summary Determination is granted and the petition of Kevin

J. Kot is dismissed.

DATED: Troy, New York
April 6, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE